

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)	
)	
SRC Holding Corp.)	Chapter 7 Case
f/k/a Miller & Schroeder, Inc.)	BKY Case Nos. 02-40284 to 02-40286
and its subsidiaries,)	Jointly Administered
)	
Debtor.)	
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Brian F. Leonard, Trustee,)	
)	
Plaintiff,)	ADV Case No. 03-4284
)	
vs.)	NON-CORE PROCEEDING
)	
Executive Risk Indemnity Inc.,)	
)	
Defendant.)	
)	
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The Marshall Group, Inc., Jerome A.)	
Tabolich, James E. Iverson, Edward J.)	
Hentges, Kenneth R. Larsen, Steven W.)	
Erickson, Paul R. Eckholm, and Mary Jo)	
Brenden,)	
)	
Intervenors.)	
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**EXECUTIVE RISK INDEMNITY INC.’S ANSWER AND AFFIRMATIVE DEFENSES
TO THE COMPLAINT IN INTERVENTION OF THE MARSHALL GROUP, INC.,
JEROME A. TABOLICH, JAMES E. IVERSON, EDWARD J. HENTGES, KENNETH R.
LARSEN, STEVEN W. ERICKSON, PAUL R. ECKHOLM AND MARY JO BRENDEN**

Executive Risk Indemnity Inc. (“Executive Risk”), defendant, by its undersigned attorneys, answers the complaint of Plaintiff/Intervenors The Marshall Group, Inc., Jerome A. Tabolich, James E. Iverson, Edward J. Hentges, Kenneth R. Larsen, Steven W. Erickson, Paul R. Eckholm and Mary Jo Brenden (collectively “Intervenors”) as follows:

PARTIES

1. Admitted.

2. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint and on that basis denies those allegations.

3. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint and on that basis denies those allegations.

4. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint and on that basis denies those allegations.

5. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint and on that basis denies those allegations.

6. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint and on that basis denies those allegations.

7. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint and on that basis denies those allegations.

8. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint and on that basis denies those allegations.

9. Upon information and belief Executive Risk admits that Brian F. Leonard is the duly appointed Trustee of the above-captioned bankruptcy cases. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 9 of the Complaint and on that basis denies those allegations.

10. Executive Risk admits that it is a Delaware corporation, but denies the remainder of the allegations of paragraph 10 of the Complaint.

JURISDICTION

11. Admitted.

12. The allegations in paragraph 12 of the Complaint consist of legal conclusions as to which no response is required. To the extent a response is required, however, Executive Risk admits the allegations in this paragraph and specifically avers that this is a non-core proceeding.

13. The allegations of paragraph 13 of the Complaint are not directed at Executive Risk and therefore no response is required. To the extent a response is deemed to be required, Executive Risk acknowledges that Intervenors do not consent to the entry of final orders or judgment by the bankruptcy court.

PROCEDURAL BACKGROUND

14. Admitted.

15. Admitted.

16. Executive Risk admits the allegations contained in the first two sentences of paragraph 16 of the Complaint. Executive Risk denies the allegations in the third sentence of paragraph 16 of the Complaint.

17. Executive Risk admits the allegations contained in the first sentence of paragraph 17 of the Complaint. Executive Risk denies the allegations of the second sentence of paragraph 17 of the Complaint.

THE INSURANCE POLICY

18. Admitted.

19. Executive Risk denies the allegations in paragraph 19 of the Complaint as written and avers instead that the Policy speaks for itself.

20. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint and on that basis denies those allegations.

THE UNDERLYING LITIGATION

21. Executive Risk denies the allegations in paragraph 21 of the Complaint as written and avers instead that M&S and/or Jerome A. Tabolich, James E. Iverson, Edward J. Hentges, Kenneth R. Larsen, Steven W. Erickson, Paul R. Eckholm and Mary Jo Brenden were named as defendants in certain lawsuits and arbitration proceedings in which the underlying plaintiffs seek to recoup losses allegedly suffered in connection with the offer, sale or purchase of the Heritage Bonds. Executive Risk further avers that several of the court cases were consolidated by the Judicial Panel on Multidistrict Litigation on August 20, 2002 and transferred to the United States District Court for the Central District of California under the caption *In re Heritage Bond Litigation* Case No. 2:02-ml-01475-DT.

22. Executive Risk denies the allegations in paragraph 22 of the Complaint as written and avers instead that it received correspondence from various persons, but not the Marshall

Group, notifying Executive Risk of certain of the underlying actions and seeking coverage under the Policy.

23. Executive Risk denies the allegations in paragraph 23 of the Complaint as written and avers instead that it has denied that Tabolich, Iverson, Larsen, Erickson, Eckholm and Brenden are entitled to coverage under the Policy for any liability arising out of the various NASD arbitrations and court actions concerning the Heritage Bonds.

24. Executive Risk denies the allegation in the first sentence of paragraph 24 of the Complaint. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second and third sentences of paragraph 24 of the Complaint and on that basis denies those allegations.

25. Executive Risk denies the allegations in paragraph 25 of the Complaint as written and avers instead that the Marshall Group purports to have obtained an assignment of rights from Tabolich, Iverson, Hentges, Larsen, Erickson, Eckholm and Brenden and has attached documents that allegedly establish such assignments as exhibits A-F to the Complaint.

26. Denied.

**COUNT I
(DECLARATORY JUDGMENT)**

27. Executive Risk incorporates by reference its responses to paragraphs 1 through 26 of the Complaint in their entirety.

28. Admitted.

29. Executive Risk admits that Intervenors have sought a determination in the United States District Court for the District of Minnesota, pursuant to 28 U.S.C. § 2201, of the parties' rights and duties under the Policy, but it denies that Intervenors are entitled to any coverage under the Policy.

COUNT II
(BREACH OF CONTRACT)

30. Executive Risk incorporates by reference its responses to paragraphs 1 through 29 of the Complaint in their entirety.

31. Denied.

32. Denied.

33. Denied.

COUNT III
(ASSIGNMENT OF RIGHTS)

34. Executive Risk incorporates by reference its responses to paragraphs 1 through 33 of the Complaint in their entirety.

35. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 of the Complaint and on that basis denies those allegations.

36. Denied.

37. Denied.

38. Denied.

COUNT IV
(UNJUST ENRICHMENT)

39. Executive Risk incorporates by reference its responses to paragraphs 1 through 38 of the Complaint in their entirety.

40. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 40 of the Complaint and on that basis denies those allegations.

41. Denied.

42. Denied.

**COUNT V
(ATTORNEYS' FEES)**

43. Executive Risk incorporates by reference its responses to paragraphs 1 through 42 of the Complaint in their entirety.

44. Executive Risk is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the Complaint and on that basis denies those allegations.

45. Denied.

REQUEST FOR RELIEF

The request for relief is not an allegation as to which a response is required. However, to the extent that a response is required, Executive Risk denies that the Intervenor is entitled to the relief requested or any relief whatsoever.

Except as expressly admitted by this Answer, Executive Risk denies the allegations in the Intervenor's Complaint.

AFFIRMATIVE DEFENSES

By way of further answer and defense to the Complaint, the Intervenor is not entitled to relief with respect to the alleged policy at issue, for the following reasons:

FIRST AFFIRMATIVE DEFENSE

The coverage alleged by the Intervenor is barred by Endorsement No. 3 to the Policy, which states:

In consideration of the premium charged, this Policy does not apply to any Claim based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged violation of:

- (1) the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, any other federal law, rule or regulation with respect to the regulation of securities, any rules or regulations of the United States Securities and Exchange Commission, or any amendment of such laws, rules or regulations; or
- (2) any state securities or “Blue Sky” laws or rules or regulations or any amendment of such laws, rules or regulations; or
- (3) any provision of the common law imposing liability in connection with the offer, sale or purchase of securities.

SECOND AFFIRMATIVE DEFENSE

The coverage alleged by the Intervenor is barred by Endorsement No. 9 to the Policy, which provides:

In consideration of the premium charged:

- (1) No coverage will be made available under the Policy for Loss including Defense Expenses for any Claim made against any Insured based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving an Insured’s actual or alleged rendering or failure to render the following services:

Investment Banking Services
Security Broker/Dealer Services
Securities Underwriting

- (2) Paragraph (1) above is not intended, however, nor shall it be construed, to apply to Loss, including Defense Expenses, in connection with any Claim against an Insured to the extent that such Claim is for a Wrongful Act by Insured Person in connection with the management or supervision of any division, Subsidiary or group of the Parent Corporation offering any of the aforementioned services.

THIRD AFFIRMATIVE DEFENSE

The Intervenor’s claim is or may be barred, in whole or in part, to the extent that the Intervenor seeks coverage for any person or entity that is not an “Insured” within the meaning of the Policy.

FOURTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that the claims for which the Intervenor seeks coverage do not give rise to a "Loss" within the meaning of the Policy.

FIFTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that the claims for which the Intervenor seeks coverage constitute "fines, taxes or penalties, punitive or exemplary damages, the multiplied portion of any multiplied damage award, or matters which are uninsurable under the law pursuant to which this Policy will be construed" Policy Section III(C).

SIXTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that the Intervenor seeks coverage for disgorgement, restitution, or payments of amounts to which any Insured is not legally entitled.

SEVENTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that the Intervenor seeks coverage for defense expenses incurred to prosecute claims for affirmative relief against others.

EIGHTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that the Intervenor seeks coverage for any Loss excluded by Section III(A)(1) of the Policy, which provides that the Policy does not apply to:

(A) **Loss**, other than **Defense Expenses**, which an **Insured** is obligated to pay:

- (1) as a result of a **Claim** brought about or contributed to in fact by any dishonest or fraudulent act or omission or any willful violation of any statute, rule or law by any **Insured**, or by gaining by any **Insured**, of any profit, remuneration or advantage to which such **Insured** is not legally entitled; provided, that for the purposes of determining applicability of this EXCLUSION (A)(1), no **Wrongful Act** of any **Insured Person** will be imputed to any other **Insured Person**; and further, provided, that each **Insured** agrees that, if it is finally established that the Underwriter has no liability to an **Insured** for **Loss** as a result of a **Claim** by reason of this EXCLUSION (A)(1), such **Insured** will repay the Underwriter upon demand all **Defense Expenses** paid on behalf of such **Insured** in connection with such **Claim**.

NINTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that the Intervenor has failed to comply with the Policy condition that:

- (1) No action may be taken against the Underwriter unless, as conditions precedent thereto, there has been full compliance with all of the terms of this Policy and the amount of the **Insureds'** obligation to pay has been finally determined either by judgment against the **Insureds** after adjudicatory proceedings, or by written agreement of the **Insureds**, the claimant and the Underwriter.

Policy, Section IV(L).

TENTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that it is covered by insurance other than the Policy.

ELEVENTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, based on the doctrines of laches, waiver and/or estoppel.

TWELFTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, by the exclusion set forth in Section III(D)(3) of the Policy, which provides that the Policy does not apply to:

- (3) any fact circumstance, situation, transaction, event or **Wrongful Act**:
 - (a) underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding of which any **Insured** had received written notice before the Inception Date in ITEM 2(a) of the Declarations; or
 - (b) which, before the Inception Date in ITEM 2(a) of the Declarations was the subject of any notice given by or on behalf of any **Insured** under any other policy of insurance

THIRTEENTH AFFIRMATIVE DEFENSE

To the extent that the Intervenor or any Insured incurred unreasonable and inappropriate loss or voluntarily assumed loss in connection with any or all of the alleged underlying liabilities, insurance coverage may be barred, in whole or in part, for such loss.

FOURTEENTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, by the exclusion set forth in Section III(G) of the Policy, which provides that the Policy does not apply to:

- (G) any **Claim** against any **Subsidiary** or other entity acquired by the **Company**, whether by merger, consolidation or otherwise, or against any **Insured Person** of such **Subsidiary** or other entity in his or her capacity as such for any **Wrongful Act**, including any **Employment Practices Wrongful Act**, committed during any time in which such

entity is not a **Subsidiary** or at any time before the **Company's** acquisition of such entity

FIFTEENTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, to the extent that Insureds under the Policy failed to mitigate damages.

SIXTEENTH AFFIRMATIVE DEFENSE

The Intervenor's claim is or may be barred, in whole or in part, by other terms, provisions, limitations, conditions, definitions, retention, and exclusions of the Policy. Executive Risk reserves the right to assert affirmatively any other matter that constitutes an avoidance or affirmative defense under applicable rules.

WHEREFORE, Executive Risk requests that the Intervenor take nothing on their claims, that all costs be taxed against them and that Executive Risk have such other and further relief to which it may be entitled.

Respectfully submitted,

BASSFORD REMELE, A PROFESSIONAL
ASSOCIATION

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